**CHAMBER OF COMMERCE**
OF THE
**UNITED STATES OF AMERICA**

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March 27, 2008

Mr. Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th Street NW, Room 11600
Washington, DC 20570-0001

**RE: Comments by the U.S. Chamber of Commerce on the NLRB's Proposed Rule on Joint Representation Petitions**

Dear Mr. Heltzer:

The U.S. Chamber Commerce ("Chamber") is pleased to submit these comments in response to the National Labor Relations Board's ("NLRB" or "Board") notice, published in the *Federal Register* on February 26, 2008, seeking public comments on its proposed amendment ("Amendment") to the NLRB's Rules and Regulations ("Rules").

The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector and region, with substantial membership in all 50 states. A significant portion of the Chamber's members engage in collective bargaining with and employ individuals who are represented by labor organizations. Similarly, a significant, and somewhat overlapping, portion of the Chamber's members are subject to union organizing campaigns which can result in representation elections pursuant to the Rules. Any amendment to the Rules would thus be of considerable importance to the Chamber's members.

The Amendment would create a new procedure that would allow an employer and labor organization to jointly petition for an election to certify the union as the exclusive bargaining representative of a unit of employees. While the Chamber does not object to the concept of a new joint procedure to expedite the election and certification process, we write to express our view that the regulations as proposed lack sufficient clarity with respect to the treatment of unfair labor practices, and the potential unwitting or involuntary waiver of important rights and procedural safeguards.

## Administrative Process and Procedure

However, before our substantive comments on the proposal are made, it is important to address two particularities with the rulemaking process the NLRB has chosen to use. First, according to the notice in the Federal Register, comments may only be filed "in eight copies, double spaced on 8 1/2 –by-11 inch paper and shall be printed or otherwise legibly duplicated."[1] Unjustified and artificial barriers for the public submission of comments do not serve to create the best record possible on which the agency may base any final decision. In addition, as some at the NLRB must surely know, technology now makes it possible to electronically submit comments, a feature now utilized by many federal agencies.[2] We encourage you to review the government's web site, www.regulations.gov, to see the wide variety of agencies that utilize this promising technology and we hope that the agency will permit submission of comments by more modern means in the future.

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[1] 73 Fed. Reg. 10,199.

[2] Indeed, even the NLRB's former Chairman recently testified that "The last of our goals has been to make the Agency more transparent to the public it serves by implementing the President's Management Agenda and E-Gov initiatives. We have renovated the Agency's Web site by greatly expanding its content, making it interactive, more user-friendly, and greatly enhancing its E-filing capacity. We are also building an enterprise-wide electronic case management system designed to reduce reliance on paper-based processes, improve operational efficiency, and better serve the public." Testimony by then-NLRB Chairman Robert J. Battista before a joint hearing of the Senate Committee on Health, Education, Labor, and Pension's Subcommittee on Employment and Workplace Safety and

In addition, we note that the agency asserts that its proposed rule changes "involve rules of agency organization, procedure, or practice" and therefore do not come within the requirements of the notice and comment requirements of the Administrative Procedure Act and do not come within the Regulatory Flexibility Act.[3] While we very much appreciate the fact that the agency has chosen to go through a notice and comment process, even though it does not believe these processes are necessary to make its proposed changes, we nevertheless are skeptical as to whether the NLRB's interpretation is correct. However, a detailed discussion of this point is beyond the scope of these comments and perhaps a fight for another day.

**The Treatment of Unfair Labor Practices Needs Clarification.**

The Chamber's primary substantive concern with the Amendment is its lack of clarity on how the Board proposes to deal with unfair labor practice charges. Specifically, while the Chamber understands and supports the concept of parties voluntarily agreeing that unfair labor practice charges will not serve to block a scheduled election, we are concerned that the Amendment's language[4] could create an inference that parties have waived their right to have unfair labor practices heard and determined by an Administrative Law Judge ("ALJ") and thereafter have that determination reviewed by the Board. The new procedure could be viewed as requiring all unfair labor practice charges be determined with finality by the Regional Director, foreclosing a hearing in front of an ALJ or Board review. The Chamber strongly

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the House Committee on Education and Labor's Subcommittee on Health, Employment, Labor, and Pensions (Dec. 13, 2007).

[3] 73 Fed. Reg. 10,200.

[4] Specifically, the preamble's language that any unfair labor practice charges would not serve to block the election, but "*will be handled in conjunction with any post-election proceedings. All election and post-election matters will be resolved with finality by the Regional Director.*" Likewise, the language of the proposed rule change in section 102.62 is also unclear.

opposes any scheme which could so seriously impair due process rights and opposes the Amendment to the extent it leaves the matter up to interpretation.[5]

The Chamber hopes that it is not the Board's intent to so seriously alter the manner in which unfair labor practice charges are handled and that the Chamber's concerns result only from the lack of clarity of the language in the Amendment. Consequently, we respectfully request the proposed regulation be altered to clarify how unfair labor practices are to be handled, including that they shall be determined by an ALJ with full rights to Board review.

**A Specific Notice of Important Rights and Procedural Safeguards is Necessary.**

As noted, while the Chamber sees some advantages to streamlining the election and certification process in limited circumstances, we are concerned that important rights and procedural safeguards are waived by doing so.

Specifically, the transfer of full and final authority to the Regional Director over certain matters clearly will aid in streamlining the process, however, it also diminishes the due process parties are normally afforded. Similarly, shortening the time of the process by dispensing with the showing of interest requirement and the normal timeframes certainly will allow parties to resolve a question concerning representation expeditiously, however, there are often important reasons why the full deliberative procedures of the Board aid in resolving such questions more effectively.

Experienced labor organizations and sophisticated employers with qualified labor counsel will understand the ramifications of a decision to petition for this new type of consent election.

[5] There is currently no circumstance under the law which gives Regional Directors the right to adjudicate the merits of unfair labor practices, much less to do so without Board review. To allow this would create an inescapable conflict of interest as the same Regional Office would be investigating, trying and deciding with finality unfair labor practices. Likewise, such a process would completely deprive a charged party of proper due process considerations, including the ability to appeal to the Board determinations which are contrary to the Act or established Board precedent. Such infringement on due process can not be excused in the name of expediency under any circumstance.

However, many employers or smaller or newer labor organizations may not fully comprehend the manner in which this new type of consent election differs from standard representation election procedures. The option to waive these rights and procedural safeguards is one we believe can be valuable under specified circumstances, though the Chamber is concerned that any waivers be made after full access to information. Consequently, the Chamber suggests that a joint petition include a notice form which details the specified rights and procedural safeguards which are waived. We respectfully submit that should a notice form similar to the sample below be utilized the Board would have the duel benefit of advancing the Board's purpose of providing another option for free and fair secret-ballot elections and may avoid potential legal challenges to the procedure by petitioners who later claim they did not knowingly or consensually waive their rights.

**Sample Notice of Important Rights and Procedures**

*The parties understand that by filing a joint petition and requesting a specified early election date they are waiving important rights and procedural safeguards, including:*

- The parties understand that by agreeing to this process the election will be held within 28 days instead of a standard timeframes (up to 42 days in the case of a stipulation and possibly longer in the case of a hearing);

- The parties understand the petition will be processed without the usual requirement that a showing of interest of at least 30% of the employees expressing an interest in holding such an election;

- The parties understand they are waiving rights to contest the appropriateness of the proposed bargaining unit;

- The parties understand they are waiving rights to appeal to the National Labor Relations Board the Regional Director's determination of all challenged ballots;

- The parties understand they are waiving their rights to appeal to the National Labor Relations Board the Regional Director's rulings on all allegations of pre-election or election conduct that may form the basis for an objection to the fairness of the election;

- The parties understand they are waiving their rights to seek a postponement of the election based on allegations of unfair labor practices committed during the pre-election period;

- The parties understand they are waiving rights to appeal to the National Labor Relations Board the Regional Director's determination of allegations that the Board Agent's conduct was in any way objectionable; and

- The parties understand they are waiving rights to appeal to the National Labor Relations Board the Regional Director's certification of the election results.[6]

## Conclusion

The Chamber is committed to supporting secret-ballot elections as the cornerstone of industrial democracy and the Act. Ultimately, the Chamber can support the Amendment as one which advances this overriding purpose provided that two areas of concern are addressed. First, the Chamber is concerned with the lack of clarity in the Amendment's treatment of unfair labor practices. The Chamber trusts this is not the intent of the Amendment and suggests clarifying it accordingly. Further, while the Amendment does entail the parties waiving other rights and

[6] If the Board intends to have unfair labor practice charges resolved by the Regional Director, as discussed earlier, additional language should be added to the Sample Notice to reflect as much.

procedural safeguards, the Chamber can support the expedited procedure provided that all parties are provided notice that they are waiving these rights in favor of the joint procedure.

We thank the Board for its consideration of these comments. Please do not hesitate to contact the Chamber if we can be of further assistance in this important matter.

Sincerely,

Randel K. Johnson

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